In the

Supreme Court of the United States

OCTOBER TERM, 1943

No.....

GILCREASE OIL COMPANY,

Petitioner,

v.

G. M. COSBY *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Circuit Court of Appeals (Circuit Judges Edwin R. Holmes and Leon McCord and District Judge Benjamin C. Dawkins; Judge Dawkins writing the opinion of the court) was filed January 20, 1943 and appears at page 522 of the record. It is reported in 132 F. (2d) 790.

JURISDICTION

Jurisdiction in the trial court was based on diversity of citizenship, the requisite amount being involved. (R. 1-3.)

The jurisdiction of this court is invoked under Judicial Code 240 as amended by Act of February 13, 1925, 43 Statutes 938—U. S. C. A., Title 28, Section 347(a).

The judgment sought to be reviewed herein was rendered January 20, 1943. (R. 529.) Date of the order denying a rehearing was March 4, 1943. (R. 539.) Extension was granted May 15, 1943, by Justice Black extending the time in which petition for certiorari could be filed to and including July 5, 1943, and on June 28, 1943, extension was granted by Chief Justice Harlan F. Stone extending the time in which petition for certiorari could be filed to and including July 31, 1943, the originals of which are on file in this Honorable Court.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In holding that the recitations contained in the deed from petitioner's grantor Arthur Christian to respondent describing the old hedge row fence as the south line of the Arthur Christian tract, as well as the same recitation in the Snoddy quit-claim describing the same fence as the north line of the Snoddy tract, are not available to petitioner to prove its south boundary.

(2) In holding that petitioner is estopped by drilling 3 of its 11 wells on the remainder of its tract as offset wells to the three wells drilled by respondents and in failing to set up its title in the hearings when respondents applied

for permits and instead of making such claim of title before the Railroad Commission, electing to make claim of title in court, which claim of title was the beginning of this suit, respondents' knowledge of the title being equal if not superior to petitioner's.

(3) In affirming judgment of the District Court that petitioner's claim be denied for the north part (being approximately one-half) of the strip in dispute in the face of the trial court's findings of fact that respondents only claimed to a line slightly north of the three wells and that petitioner had proved its right to title and possession of the north part of the strip in dispute.

ARGUMENT

SUMMARY OF THE ARGUMENT

(1) When respondents claim under a deed from petitioner's grantor describing the south boundary of grantor's tract of land as contended for by petitioner when coupled with quit-claims from the owner of the adjoining tract containing recitals calling for the same line as the boundary of the adjoining tract, the trial court should have held that such recitals are available to petitioner to prove boundary of its tract and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

(2) The trial court should not have denied petitioner the right to claim its land because it elected not to appear and set up title before the Railroad Commission of the State of Texas when respondents applied for permits, the petitioner having drilled three of the eleven wells on the remainder

of its land as offsets to the wells drilled by respondents, and later instituted suit in the Federal District Court for title and possession of its land, respondents having at least equal if not superior, knowledge of the title, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

(3) When petitioner sues for a tract of land and respondents only claimed half of the land sued for and the trial court found that petitioner had established its right to title and possession of half, judgment should have been rendered by the trial court for petitioner for the half to which petitioner proved right of title and possession and should not have rendered judgment against petitioner for the whole tract, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

CONFLICT WITH CONTROLLING STATE DECISIONS

I.

When respondents claim under a deed from petitioner's grantor describing the south boundary of grantor's tract of land as contended for by petitioner, when coupled with quit-claims from the owner of the adjoining tract containing recitals calling for the same line as the boundary of the adjoining tract, the trial court should have held that such recitals are available to petitioner to prove boundary of its tract, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

When Arthur Christian executed the conveyance of the minerals within and under his tract under which convey-

ance petitioner owns the southeast 31 acres, he conveyed his entire tract, irrespective of whether or not it extended to a slight extent over into the adjoining survey. This question was settled by the decision in *Ballard v. Stanolind Oil & Gas Company* (5th Cir.), 80 F. (2d) 588, one of the cases cited above, in which one Ballard "discovered" a strip along the north of this same Arthur Christian lease under which petitioner claims in the instant case, from which opinion it will be seen that the Hooper Survey adjoins the Hathaway Survey on the north, the survey line between the two surveys being a common line as in the case of the south boundary between the Hathaway and the Castleberry Surveys. Just as is being attempted in the instant case, the contention was made in the *Ballard* case that the line between the Hooper Survey on the north and the Hathaway ran slightly south of the north boundary line of the Arthur Christian tract, leaving a long, narrow, strip of about four acres which Ballard contended was in the Hooper Survey, and a lease to which Ballard obtained subsequent to the date of the original Christian lease just as was done in this case. The court held that Arthur Christian intended to convey the minerals under his whole tract as shown from the very wording of the lease reciting that the tract was considered 100 acres of land, more or less, being the same land purchased from J. M. Farmer but in a recent survey found to be 107 acres "it being the intention to include all land owned or claimed by lessor in said survey or surveys * * *". The general cover-all clauses reciting that the intention of the parties to convey the entire tract owned or claimed by lessor in said survey or surveys operated to convey the entire tract, *even if it should extend over into the adjoining survey a slight extent*, the court using the following

language discussing the very lease under which petitioner claims in the instant case:

> "* * * he further found that the question which survey the land lay in was immaterial, for that the instruments under which plaintiff claimed, in law embraced and carried title to the strip, *in whichever survey it lay.* * * * It is not, it cannot be disputed that the grantors believed, until defendant purported to discover that the case was different, that the lands they owned were only in the Hathaway survey, and that the fence marked the boundary line between them and the adjoining survey. They did not, until defendant's 'discovery' claim any land in the Hooper survey. They claimed to the fence line as in the Hathaway survey. In the lease under which plaintiff holds, they declare that it was their intention to include in the lease 'all lands owned or claimed in the said survey.' *It has been decided in this state that a cover-all clause of this kind, under circumstances similar to those here, may be looked to to complete and perfect the description in an instrument to make it carry out the intent of the parties.* Sun Oil Co. v. Burns (Tex. Com. App.), 84 S. W. (2d) 442, 444; Sun Oil Co. v. Bennett (Tex. Com. App.), 84 S. W. (2d) 447; Gulf Production Co. v. Spear (Tex. Com. App.), 84 S. W. (2d) 452; Smith v. Westall, 76 Tex. 509, 13 S. W. 540." (Italics ours.)

Since Arthur Christian conveyed his entire tract in the lease under which petitioner holds and petitioner owned the south 31 acres, petitioner owned to the south boundary line of the Arthur Christian tract wherever it may be. A deed obtained by respondents from Arthur Christian five years subsequent in date to the deed under which petitioner holds could not possibly convey any land to respondents, because under the Ballard decision, and many other decisions

in which the law is well settled, Arthur Christian had already conveyed his entire tract and had no strip of land left to convey.

Respondents' deed under Arthur Christian contains a recital describing the Arthur Christian south line as follows:

> "Thence *following a fence on the North line of Thad Snoddy 50-acre tract,* as follows: South 88 deg. 07′ East, 274 feet; South 87 deg. 43′ East, 400 feet; East 500 feet; North 81 deg. 58′ East 128.3 feet; East 473 feet to a stake the Southeast corner of this tract;" (R. 525.) (Italics ours.)

and which when fitted to the ground is found to be the old hedge row fence contended for by petitioner as its south line. (R. 2.) Recitals are binding on privies in blood, privies in estate, and privies in law under a long line of authorities too long to burden the court with here. This question was settled by the Supreme Court of the United States in the celebrated case of *Tarver v. Jackson* (Sup. Ct. of U. S.), 4 Peters B 1; 29 U. S. 84; 7 L. ed. 761.

Respondents did not abandon their Arthur Christian title nor disclaim under the same but introduced it in evidence. It was found in the findings of fact at the trial (R. 504-5), and is recited in the opinion of the Circuit Court of Appeals (R. 525). Under that title respondents are in law estopped. The decision becomes a matter of law and determines the case, the other facts become immaterial.

However, in this case respondents also supplemented their Arthur Christian title with quit-claims under the ad-

joining owner, Snoddy. The recitals in the Snoddy quit-claims (R. 367) also contain the recital

> "*Thence following a fence on the North line of Thad Snoddy 50-acre tract*, as follows: South 88 deg. 07′ East, 274 feet; South 87 deg. 43′ East, 400 feet; East 500 feet; North 81 deg. 58′ East 128.3 feet; East 473 feet to a stake the Southeast corner of this tract." (R. 367.) (Italics ours.)

which description when fitted to the ground is the old hedge row fence and which Snoddy is recognizing as his north boundary line. (R. 2.) The recitals in these quit-claims when taken in connection with the recitals contained in respondents' Arthur Christian deed identifying the Arthur Christian south boundary line as the old hedge row fence bring this case within the terms of *McBride v. Loomis* (Tex. Sup. Ct.), 212 S. W. 480, holding that in trespass to try title when defendant relying on a deed, introduced the same in evidence, the recitals in the deed are available to the plaintiff in the establishment of his title, although defendant was also relying on a quit-claim deed from heirs of a former owner. In the *Loomis* case, just as was done in this case, the defendant sought to avoid the effect of the recitals in his deed by attempting to claim also under a quit-claim to which the plaintiff was a stranger, contending that since the plaintiff was a stranger to the quit-claim he could not avail himself of the recital, the court saying:

> "There was no admission in the trial court by defendant that the administrator's deed was invalid, such admission being made only on appeal. The deed being thus relied on by defendant, and it, together with its recitals were available to plaintiffs in the establishment of their title."

The instant case is stronger than the *Loomis* case in that the respondents have never repudiated any claim under their Christian deed, but claimed under it at the time of the trial, claimed under it in the Circuit Court of Appeals, and still claim under it.

Instead of the case of *McBride v. Loomis*, supra, the Circuit Court of Appeals applies the case of *Kuykendall v. Spiller* (Tex. Civ. App.), 299 S. W. 522, which is not only a decision of an inferior court, but it will be seen that the facts in the instant case, both as stated in the court's opinion (R. 522) and as stated herein, do not come within the law declared in the *Kuykendall* case. That case holds that if the plaintiff is a stranger to a deed the recitals do not bind. That would be true if respondents only claimed under the Snoddy quit-claims. Petitioner is a stranger to the Snoddy quit-claims, but petitioner is not a stranger to respondents' Arthur Christian deeds, as Arthur Christian is petitioner's grantor and petitioner is therefore in privity with them. They therefore bind, and when taken in connection with the Snoddy quit-claims, bring the instant case within the law declared in the *Loomis* case. The trial court therefore was not at liberty to consider any other facts in the case, and all other facts whatever they might be became immaterial and as a matter of law the court was bound to find that the south line of the Christian tract and the north line of the Snoddy tract was that line which both respondents' Arthur Christian deeds and respondents' Thad Snoddy quit-claims, as well as respondents' pleadings, declares it to be, which in the wording of all of respondents' deeds un-

der Christian as well as under Snoddy, as well as respondents' pleadings, is as follows:

> "Thence *following a fence on the North line of Thad Snoddy 50-acre tract*, as follows, 88° 07′ E. 274 Feet; S. 87° 43′ E. 400 feet; East 500 feet; N. 81° 58′ E. 128.3 feet; East 473 feet, to a stake the southeast corner of this tract." (Italics ours.)

which is the line contended for by petitioner. (R. 2.)

We submit, therefore, that the *Loomis* case, the decision being by the Supreme Court of the State of Texas, declares the local Texas law and is determinative of the instant case and since the Circuit Court of Appeals has refused to follow the *Loomis* case, the decision below is in square conflict therewith.

It also becomes apparent that Thad Snoddy quit-claiming land north of his north boundary line and within the Arthur Christian tract could have of necessity conveyed no title and did convey no title.

II.

The trial court should not have denied petitioner the right to claim its land because it elected not to appear and set up title before the Railroad Commission of the State of Texas when respondents applied for permits, the petitioner having drilled three of the eleven wells on the remainder of its land as offsets to the wells drilled by respondents, and later instituted suit in the Federal District Court for title and possession of its land, respondents having at least equal if not superior, knowledge of the title, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

The opinion (R. 527) uses the following language:

> "It also appears that defendants drilled three wells on the tract in dispute after separate applications and hearings before the Railroad Commission of Texas, the body charged with the duty of determining whether permits shall be given, after notice to plaintiff who not only failed to appear and contest defendants' applications, but in each instance, obtained from the same authority permits to drill offsetting wells on their own property immediately north of these locations. It was only after defendants' wells had proved successful and large quantities of oil had been produced, that plaintiff determined to bring this suit."

presumably holding that the conduct mentioned prevent petitioner from claiming its land. Such holding is directly in conflict with the recent decision of the Supreme Court of the State of Texas in *Magnolia Petroleum Company v. Railroad Commission et al.*, 170 S. W. (2d) 189, March 31, 1943, in which it is held that the State Railroad Commission is given the administration of the conservation laws only and has nothing whatsoever to do with titles and grants no affirmative rights to the permittee to occupy the property and, therefore, would not cloud the title of the owner, the court saying:

> "It merely removes the conservation laws and regulations as a bar to drilling the well and leaves the permittee to his rights at common law. Where there is a dispute as to those rights, it must be settled in court. The permit may thus be perfectly valid so far as the conservation laws are concerned and yet the permittee's right to drill under it may depend upon his establishing title in a suit at law. *In such a suit the fact that a permit to drill had been granted would not be admissible in support of permittee's title.*" (Italics ours.)

Thus, the decision of the Circuit Court of Appeals is in direct conflict with the opinion of the Supreme Court of the State on this subject.

III.

DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR EXERCISE OF SUPERVISORY POWER

When petitioner sues for a tract of land and respondents only claim half of the land sued for and the trial court finds that petitioner had established its right to title and possession of half, judgment should have been rendered by the trial court for petitioner for the half to which petitioner proved right of title and possession and should not have rendered judgment against petitioner for the whole tract, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court for doing so.

The statement of facts on this question will suffice. The law is obvious. It might be noted however, that the first part of Rule 52—Federal Rules of Civil Procedure, Rule 52(a), U. S. C. A., Vol. 28, under Sec. 723(a) provides:

> "(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon *and direct the entry of the appropriate judgment.*" (Italics ours.)

while it is provided by the Texas Statutes, Art. 7386 (R. S. 1925), now covered in the same words by Texas Rule of Civil Procedure, Rule 802, as follows:

> "Art. 7386. When planitiff proves part—Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs."

It is, of course, obvious if litigation is to mean anything whatever that the court must render its judgment in accordance with what it finds the fact to be. Otherwise, litigation in the Federal Courts is rendered entirely meaningless.

It might be noted that the trial court kept this case under advisement from the date of the trial on February 21, 1940 until the 21st day of November, 1941. (R. 513.) During this time, the case was argued orally to the court and several written briefs were presented to the trial court, setting out in detail petitioner's contentions. On appeal, this proposition was presented to the Circuit Court of Appeals in Proposition 2 in petitioner's original brief. It was again urged in petitioner's petition for rehearing. (R. 531.) Petitioner filed a second petition for rehearing in the lower court, and, in addition, a written argument. The written argument urged this ground, and the second petition urged consideration of the original petition which includes this ground. Yet, it will be noted that neither the opinion nor the orders denying the first or second petition for rehearing mention or touch on this point, all of them completely ignoring petitioner's contention here made.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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